No. 89-1421

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARVIN POWELL, BRIAN HOLLOWAY, MICHAEL KENN, MICHAEL DAVIS, JAMES LOFTON, MICHAEL LUCKHURST, DAN MARINO, GEORGE MARTIN, and STEVE JORDAN, on behalf of themselves and all class members,

Petitioners,

—v.—

NATIONAL FOOTBALL LEAGUE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

INTRODUCTION

In opposing the Petition for Writ of Certiorari, respondents do not dispute that the questions presented by the Petition are of enormous importance to both antitrust and labor law policy. Rather, respondents' opposition seeks primarily to argue the merits, which are not yet before this Court, and to obscure the final and conclusive nature of the judgment below. Neither of these arguments can change the fact that the Eighth Circuit's decision finally dismissed petitioners' past antitrust claims against the First Refusal/Compensation system and directly conflicts with this Court's prior decisions regarding the non-statutory labor exemption.

I. THE JUDGMENT BELOW CONCLUSIVELY AND FINALLY ADJUDICATES ALL PETITIONERS' PAST RESTRAINT-OF-TRADE CLAIMS AGAINST THE FIRST REFUSAL/COMPENSATION SYSTEM.

1. Respondents' argument that the Petition is premature (Opp. at 9-11) is specious. The 2-1 majority of the Court of Appeals unequivocally and finally determined that petitioners could not maintain a restraint of trade claim against respondents' unilateral continuation of the First Refusal/Compensation system through the 1989 NFL season, *after* the collective bargaining agreement had expired and *after* impasse had been reached in efforts to reach a new agreement:

> In sum, we hold that the antitrust laws are inapplicable under the circumstances of this case as the nonstatutory labor exemption extends beyond impasse. We reverse the order of the district court and *remand the case with instructions to enter judgment in defendants' favor on Counts I, II, and VIII of plaintiffs' amended complaint.*

(Pet. App. 19a) (emphasis added). The pendency of other claims cannot obscure one undeniable fact: the critically

important questions of federal labor and antitrust policy raised by this ruling are now ripe for this Court's review.[1]

As respondents themselves have acknowledged, in successfully petitioning for interlocutory review of the district court's ruling under 28 U.S.C. ¶ 1292(b), the labor exemption issue constitutes a discrete and controlling question of law, the resolution of which determines, as a threshold matter, whether the district court will ever hear the antitrust merits of petitioners' claims. Every appellate decision rendered pursuant to § 1292(b) is, by definition, "interlocutory." That fact has not inhibited this Court from routinely granting certiorari to review such decisions in appropriate cases.[2]

By asserting that certiorari should be denied because there are still issues awaiting resolution by the district court, respondents imply that an immediate review of the Eighth Circuit's decision would be an inefficient use of judicial resources. That is not so. The only remaining claims in the

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1 Contrary to respondents' assertion, there is no prospect that "renewed collective bargaining may render review" of the Eighth Circuit's decision "unnecessary." (Opp. at 8). To prevent respondents from enjoying what Chief Judge Lay described as a "Shangri-La of everlasting immunity from the antitrust laws" (Pet. App. 30a), the players' bargaining representative, the NFLPA, formally renounced its bargaining rights on November 6, 1989 (Pet. App. 62a). Notwithstanding respondents' naked assertion to the contrary (Opp. at 8), the NFLPA completed the process of renouncing its bargaining rights on December 5, 1989 when its Board of Directors adopted entirely new By-Laws which expressly forbid any officer, member or employee of the Association from participating in, or acting as an agent for, collective bargaining.

The recently-filed suits by the respondents and by eight players concerning respondents' unilateral imposition of the so-called Plan B player restraints *after* February 1, 1990 (Opp. at 9-10) do not involve respondents' post-expiration and/or post-impasse imposition of the First Refusal/Compensation system on Powell class members during the 1987, 1988 and 1989 NFL seasons. It is that past conduct, and only that past conduct, which the Eighth Circuit majority has now exempted from the antitrust laws.

2 *See, e.g., Finley* v. *United States*, _____ U.S. _____, 109 S. Ct. 2003, 2005 (1989); *Chan* v. *Korean Air Lines Ltd.*, _____ U.S. _____, 109 S. Ct. 1676, 1679 (1989); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 336-37 (1982); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 644 (1980).

case involve challenges either to *different* conduct by respondents, or to conduct which occurred *after* the NFLPA ended its role as a collective bargaining representative, as to which the overriding labor exemption issue presented by this petition is not relevant.

2. Respondents' position opposing certiorari here stands in stark contrast to their position before this Court when they were seeking review of the Eighth Circuit's previous decision on the labor exemption issue in *Mackey* v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). As respondents then stated:

> [T]he appropriate accommodation of national labor and antitrust policies is a matter of great and continuing importance to the future of labor-management relations in professional sports. *It is also of basic importance throughout industry and business of all kinds.* (emphasis added) (citations omitted) . . .
>
> Justice Marshall dissenting in *Flood* v. *Kuhn*, 407 U.S. 258, 293-96 (1972), called for a resolution of the interrelationship in professional sports between the antitrust laws and the labor laws. Review by this Court is clearly warranted here to provide guidance as to the requisite accommodation . . . .

NFL Petition for Writ of Certiorari in No. 76-932, at 21-23.

Despite extensive litigation in the lower courts since respondents voluntarily dismissed their petition in *Mackey*,[3] this Court has yet to provide "guidance as to the requisite accommodation" between the labor and antitrust laws for which respondents pleaded in *Mackey*. Thirteen years later, this case provides the proper vehicle for this Court to resolve these controlling questions of labor and antitrust policy, which have critical implications, not only for professional sports, but as respondents once noted, "throughout industry and business of all kinds." (*See also* Brief of Amici Curiae submitted by State Attorneys General; Brief of Amici Curiae

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3 *See* Pet. at 15-16 and accompanying notes.

submitted by the National Basketball Players Association and National Hockey League Players Association).

In short, this Court should grant certiorari to answer the question which even respondents concede is of national importance—the point at which the non-statutory labor exemption ends. While respondents argue that the Eighth Circuit's decision creates such a point sometime short of union renunciation of collective bargaining (Opp. at 7-8, 13), *nowhere* in respondents opposition is there even a hint as to when this occurs. Respondents seek to defer indefinitely this Court's consideration of the labor exemption issue because respondents know that they cannot defend their restraints on the antitrust merits.[4] Members of the petitioner class are continuing to suffer irreparable injury to their short playing careers while they await final judicial guidance on this issue.[5] Only a decision by this Court can provide such guidance to the "literally millions of employees" engaged in multiemployer bargaining. (Opp. at 17).

II. RESPONDENTS HAVE COMPLETELY MISCONSTRUED THE DECISIONS OF THIS COURT IN ARGUING THAT THE EIGHTH CIRCUIT'S JUDGMENT IS CONSISTENT WITH SETTLED LAW

1. Respondents argue that *Connell*, *Jewel Tea* and *Pennington*[6] have no application to restraints on player move-

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4 Significantly, the two cases that respondents cite as supporting their "competitive balance" antitrust defense in this case (Opp. at 2 n.2) actually held respondents' conduct to be antitrust violations.

5 Indeed, the district court below found it "probable that . . . at least some of the players are likely to sustain irreparable harm. . . ." *See Powell* v. *National Football League*, 690 F. Supp. 812, 818 (D. Minn. 1988). *See also, e.g.*, *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) (reinstating injunction pendente lite issued in *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971)); *Linseman* v. *World Hockey Ass'n*, 439 F. Supp. 1315, 1319-20 (D. Conn. 1977); *Bowman* v. *National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975).

6 *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965); *Local Union 189, Amalgamated Meat Cutters and Butcher Workmen of North Am.* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

ment in professional sports because such restraints assertedly restrain competition solely in a "labor market" and thus are of no concern under the antitrust laws (Opp. at 15). This argument ignores *Radovich* v. *National Football League*, 352 U.S. 445 (1957)—which respondents fail even to cite—where precisely such claims were held cognizable under the antitrust laws. It also ignores the numerous other decisions of this Court where the antitrust laws have been applied to restraints in employment markets.[7] Indeed, it was because the Sherman Act does apply to restraints in markets for employee services that Congress enacted the statutory labor exemption, which exempts *only* union, but not employer, restraints in such labor markets from antitrust scrutiny. 15 U.S.C. § 17 (1982).

The decisions in *Connell*, *Jewel Tea* and *Pennington* are not to the contrary. These cases examined whether the restraints at issue restricted competition in non-labor markets only because, unlike here, the unions were the defendants (being sued by third party employers), and the labor market effects of the restraints *had been agreed to* by the union, and thus shielded from the antitrust laws. (Pet. at 13-15).[8] Where, as here, there is no such unexpired agreement with a union, the teaching of these cases is that the non-statutory labor exemption is inapplicable and the antitrust laws must be applied to the anticompetitive effects of the restraints in labor markets. (Pet. at 15-17)[9] Even if there were any colora-

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7 *See, e.g.*, *Federal Trade Comm'n* v. *Superior Court Trial Lawyers Ass'n*, ____ U.S. ____, 110 S. Ct. 768 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Anderson* v. *Shipowners Ass'n of Pacific Coast*, 272 U.S. 359 (1926). *Cf. Mackey* v. *National Football League*, *supra*, 543 F.2d at 617-19; *Smith* v. *Pro-Football*, 593 F.2d 1173, (D.C. Cir. 1978).

8 *See also Richards* v. *Nielsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy J.) ("[t]he nonstatutory exemption prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions").

9 Nor can respondents find any support for their position that labor market restraints are exempt from the antitrust laws in the inapposite line of

ble basis to respondents' revisionist thesis that *Connell*, *Jewel Tea* and *Pennington* somehow meant to hold that the antitrust laws do not apply to labor market restraints, surely this is just the type of landmark legal issue which warrants review by this Court.

The Eighth Circuit's holding that the non-statutory exemption extends beyond expiration, beyond impasse, and even insulates restraints never contained in a bargaining agreement as long as they were "forwarded in negotiations" by employers simply cannot be squared with this Court's decisions in *Connell*, *Pennington*, and *Jewel Tea*. Writing for the Court majority, Justice White declared in *Pennington* that even where the restraints benefitted labor and involved a mandatory subject of bargaining, they would not be "automatically exempt from Sherman Act scrutiny . . . regardless of the subject of the form and content of the *agreement*." 381 U.S. at 664-65 (emphasis added). In so holding, a clear majority of the Court expressly rejected the views of Justice Goldberg, who dissented in *Pennington* and wrote separately in *Jewel Tea*, urging that *any* labor agreement conforming to the labor laws should be exempt. 381 U.S. at 727-28. The Eighth Circuit has extended the exemption three giant steps further than even Justice Goldberg (whose views have never been adopted by this Court) would have. Under the panel majority's formulation: (a) no agreement or other manifestation of consent by the union to continuation of the restraint is required; (b) the restraints are immune from scrutiny even if they further no union objectives but serve only to eliminate competition among the employers; and (c) all such restraints

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cases challenging employer labor tactics for resisting union *bargaining* demands—e.g., lockouts, employer strike insurance, and the hiring of replacement workers. (Opp. at 16). These cases involved employer activity directed, not at any market for employee services, but at *union activity* itself. In such situations, the antitrust laws do not apply because injury to the union's ability to bargain—as opposed to the antitrust injury caused to employees by agreements to eliminate competition for employees' services—is not "antitrust injury" within the scope of the Sherman Act. *See Associated General Carpenters of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540 (1983).

are immune as long as they were proposed in bargaining, regardless of the union's emphatic rejection of them.

This unprecedented expansion of antitrust immunity runs directly counter to this Court's decisions carving out a very limited immunity for only certain types of agreements which operate to benefit employees and calls urgently for this Court's review.

2. There is similarly no ground for this Court to deny certiorari on the basis of respondents' claim that they should not be held liable under the antitrust laws for doing only what the labor laws purportedly require—refraining from implementing changes in employment terms after expiration of a collective bargaining agreement in violation of their labor law duty to bargain. (Opp. at 11-13). Even were this a correct characterization of the Eighth Circuit's ruling, it would only underscore the importance of having this Court review that decision to define a proper balance between antitrust and labor policy. But this argument argues for a *reversal* of the actual ruling of the Eighth Circuit, which in fact extends the labor exemption far beyond any purported labor law duty of an employer to maintain the status quo.[10]

Even respondents concede that the labor laws do *not* require employers to maintain the terms and conditions of an expired agreement beyond an "impasse" in bargaining. Once impasse has been reached, employers are free under the labor laws "to implement new terms of employment . . . ." (Opp. at 13). But that does not automatically immunize restraints collectively imposed by a group of competitors from antitrust scrutiny. Respondents' assertion that they were somehow fulfilling a duty of labor law in carrying forward the challenged restraints after impasse—not to mention instituting an entirely *new* system of Plan B restraints—is pure sophistry.

Indeed, if impasse is the correct endpoint for the nonstatutory labor exemption, respondents' conduct here illustrates plainly why certiorari should be granted. It was only because an impasse had been reached in the negotiations that

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10 Here, the District Court found that impasse had been reached, as did the NLRB General Counsel (Pet. App. 4a).

respondents were able, under the labor laws, to impose the *new* Plan B restraints never previously agreed to by the union and, at the same time, drastically reduce the benefits to players provided in the expired collective bargaining agreement. Respondents' contention that they have *not* eliminated or reduced the collective bargaining benefits to players, while continuing their anticompetitive restraints, is simply wrong. (Opp. at 5 n.5). The NLRB has already accepted respondents' argument that they no longer have to make contributions to the players' pension plan because the collective bargaining agreement requiring such payments expired.[11] In addition, the severance benefits to players have been completely eliminated by respondents. Petitioners thus no longer have the benefits that they received in exchange for their original consent to respondents' restraints for a fixed period of time, while the Eighth Circuit holds that the labor exemption benefiting respondents continues indefinitely. There could be no stronger case for this Court to grant certiorari to make it clear that the non-statutory labor exemption cannot possibly extend to such post impasse restraints.

3. There is, of course, no logic to respondents' claim that because petitioners believe that the proper endpoint of the non-statutory labor exemption occurs at contract expiration (Pet. at 12-17), this somehow makes the Eighth Circuit's decision rejecting both contract expiration and impasse as the endpoint for the labor exception *less* worthy of review by this Court. (Opp. at 11-13). If impasse is the correct endpoint, this is all the more reason to grant, not deny, certiorari in this case. Respondents offer absolutely no support for the Eighth Circuit's extension of the non-statutory labor exemption beyond expiration of the agreement, beyond impasse, to a point that no one has yet identified.

4. There is also no basis for respondents' argument that certiorari should be denied because petitioners "have available to them a full array of economic and legal weapons" and therefore should not be permitted to maintain an antitrust

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11 *See* Ruling of NLRB Regional Director, Sept. 15, 1989 and Ruling of NLRB Office of Appeals, April 6, 1990, attached hereto as Exh. A.

action when they have "an adequate, and exclusive remedy at the NLRB . . . ." (Opp. at 19).

This Court has, at least three times, held that antitrust claims are *not* foreclosed by the existence of NLRB remedies for violation of the labor laws. In *Connell*, the Court stated:

> There is no legislative history . . . suggesting that . . . Congress thought allowing antitrust remedies in cases like this would be inconsistent with the remedial scheme of the NLRA.

421 U.S. at 634 (footnote omitted). In *Jewel Tea*, the Court earlier noted that:

> [E]ven in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action . . . [because] [i]t is the function of the Board's General Counsel rather than . . . a private litigant to determine whether an unfair labor practice complaint will ultimately issue.[12]

In *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), the Court again stressed that the availability of an NLRB remedy did not foreclose the federal courts from deciding whether an "agreement" violated the antitrust laws. *Id.* at 85.

Respondents' reiteration of the Eighth Circuit's erroneous view that the NLRB remedy displaces antitrust policy serves only to highlight the direct conflict between the decision below and the decisions of this Court.

5. That respondents' view of the decisions of this Court could be so diametrically opposed to the views of not only petitioners, but to those of eight sovereign states (*See* Brief of Amici Curiae submitted by State Attorneys General), simply underscores the need for this Court to resolve the uncertainty in this area of the law. Once and for all, the endpoint of the non-statutory labor exemption should be unequivocally estab-

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12 The Court stated that it knew "of no case where the court has ordered reference [to an agency] of an issue which the administrative body would not itself have jurisdiction to determine . . . ." *Id.* at 687-88.

lished so that employees and employers can know when the labor exemption ends and antitrust law begins.

CONCLUSION

This case presents issues of antitrust and labor law policy of overriding importance. The petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

United States Government
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September 15, 1989

Yablonski, Both & Edelman
Attn: Mr. Joseph A. Yablonski
Attorney at Law
1140 Connecticut Avenue, NW
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Re: National Football League
Management Council
Case 5-CA-20006

Dear Mr. Yablonski:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully considered.

The charge alleges that the Employer violated Section 8(a)(1) and (5) and 8(d) by: (1) failing and refusing to contribute $11,340,000 to the Bert Bell NFL Player Retirement Plan (the Plan) on or about March 31, 1988, and (2) failing and refusing to contribute a separate payment of $1,160,000 to the Plan on or about March 31, 1988. As a result of the investigation, it does not appear that the Employer violated the Act by failing and refusing to make the $11,340,000 contribution.

Under *Cauthorne Trucking*, 256 NLRB 721 (1981), an employer may be relieved of a post-contractual obligation to contribute to health, welfare or pension plans that are part of a collective-bargaining agreement if: (1) the changes are made subsequent to the parties reaching a bargaining impasse, or

(2) the union has waived its right to bargain regarding the changes. The investigation reveals that the 1982 collective-bargaining agreement between the NFL Players' Association and the National Football League expressly requires payments to be made *beginning* April 1, 1982, and *ending* March 31, 1987. It also provided that further contributions were to be made "as provided in the Collective Bargaining Agreement effective during such years". Also, in the 1970 and 1977 collective-bargaining agreements, identical language regarding the Plan was used, and at the expiration of each agreement the Employer ceased contributions. There is no evidence that the Union ever voiced dissatisfaction with that arrangement. Accordingly, it appears that the express language of the 1982 agreement and the parties' past bargaining history establish that the Union waived its right to bargain over the issue of continued contributions.

In addition, it also appears that the parties reached a good-faith impasse in negotiations on October 11, 1987. At that point the Employer was free to implement its last offer, including its offer concerning plan contributions. Because the Employer's pre-impasse proposal did not include the $11,340,000 contribution and because the Employer was not contractually obligated to make that contribution, it was free not to contribute the $11,340,000.

For the foregoing reason, further proceedings in this matter are not warranted, and I am refusing to issue complaint in this matter. However, this decision does not affect the remaining allegation concerning the separate $1,160,000 contribution. Disposition of that portion of the charge is being further processed by the Region.

Pursuant to the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing an appeal with the Acting General Counsel, addressed to the Office of Appeals, Room 1154, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be

received by the Acting General Counsel in Washington, D.C., by the close of business on September 29, 1989. Upon good cause shown however, the Acting General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the Acting General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

/s/ LOUIS J. D'AMICO
Louis J. D'Amico
Regional Director

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 6, 1990

Re: National Football League
Management Council
Case Nos. 5-CA-20006
5-CA-20421

Mr. Joseph A. Yablonski
Attorney at Law
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1140 Connecticut Avenue, NW
Washington, DC 20036

Dear Mr. Yablonski:

Your request for reconsideration of our decision to sustain the Regional Director's refusal to issue complaint in Case No. 5-CA-20006 and your appeal from the Regional Director's refusal to issue complaint in Case No. 5-CA-20421 have been duly considered. After a complete review of the entire matter, including your appeal, the arguments raised in your request for reconsideration and the arguments raised during your oral presentation, it was decided to deny the motion for reconsideration in Case No. 5-CA-20006 and the appeal in Case No. 5-CA-20421.

The charges concern, in relevant part, the failure of the Employer to continue making $11,340,000 pension payments after the expiration of the 1982-7 contract. As stated in the letter denying your appeal in Case No. 5-CA-20006, the use of the word "ending" in the contract between the Union and the Employer clearly expresses an intent to terminate the Employer's pension contribution obligation. While you contend that the word "ending" should be read to mean the

ending of a time period rather than the ending of an obligation, Article XXXIV, Section 2, of the last collective bargaining agreement, states that "[c]ontributions in future years will be as provided in the collective bargaining agreement effective during such years." This provision was viewed as expressing termination of the pension obligation, absent execution of a new agreement. The fact that the contract provides for specific contributions for specific periods of time leads to a similar conclusion. We note also that there was no bargaining history to the contrary. Thus the Employer's annual "catch up" payments to make up for contributions skipped after the expiration of an earlier contract were admittedly the result of negotiations rather than a mutual acknowledgement or legal finding that the obligation to make such contributions had survived that contract. Moreover, the fact that the plan itself lists the amount due after expiration of the contract as consisting of only the $1,160,000 payment was deemed further evidence to support the claim that the Employer's obligation regarding the $11,340,000 ceased after the contract expired. Finally, while in *General Tire & Rubber Company*, 274 NLRB 591 (1985), there was language addressing the first 90 days after expiration of a contract, unlike the instant case, the contract there was silent about what was to occur thereafter.

Very truly yours,

/s/ MARY M. SHANKLIN
Mary M. Shanklin, Director
Office of Appeals

For: Jerry M. Hunter
General Counsel